

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARCUS KELO OROZCO,

Plaintiff,

Civ. No. 2:20-cv-316-MK

v.

ORDER

DR. BENNETTE “BEN” NORTON, M.D.

Et al.,

Defendants.

MCSHANE, Judge:

Magistrate Judge Mustafa Kasubhai filed a Findings and Recommendation, (ECF No. 68), and the matter is now before this court. *See* 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Both parties filed objections. Accordingly, the Court reviewed the file of this case *de novo*. *See* 28 U.S.C. § 636(b)(1)(c); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

The Court finds no error and concludes the report is correct. Although this is a close call, Plaintiff submitted evidence that perhaps equitable tolling should apply to his claims. Although Plaintiff saw multiple providers, including Dr. Norton himself, on over 50 medical appointments after the 2014 appointment at issue, Plaintiff did not mention, even on one occasion, any pain or discomfort from his hernia. That said, Plaintiff submitted a sworn declaration stating that he was too fearful of retaliation from Dr. Norton “to bring up this specific subject matter of my hernia

injury” again. Orozco Decl. ¶ 38. Whether Plaintiff was in fact too fearful of retaliation to (1) mention his hernia or (2) file a grievance related to the 2014 appointment is, by the slimmest of margins, a question for the jury.

Magistrate Judge Kasubhai’s Findings and Recommendation (ECF No. 68) is ADOPTED. Defendants’ Motions for Summary Judgment (ECF No. 28) is GRANTED with respect to (1) Plaintiff’s Eight Amendment claim against all Defendants except Dr. Norton and (2) Plaintiff’s Fourteenth Amendment claim against all Defendants. Defendants’ Motion for Summary Judgment is DENIED with respect to Plaintiff’s First Amendment and Eight Amendment claims against Dr. Norton.

The parties are granted 30 days to consider whether to consent to trial before Magistrate Judge Kasubhai. In the absence of full consent, Judge McShane’s courtroom deputy will contact the parties to obtain dates for a late Summer or early Fall 2023 trial in Pendleton, Oregon.

IT IS SO ORDERED.

DATED this 28th day of March, 2023.

/s/ Michael J. McShane
Michael McShane
United States District Judge